Missouri Appellate Court Declines To Recognize Cause Of Action For Negligent Recommendation To A Prospective Employer

Labor & Employment Law Update

on June 12, 2019

There is no duty of care to "not make a negligent recommendation to a prospective employer" in Missouri. That is the upshot of an April, 2019 ruling out of Missouri's Southern District Appellate Court, *Doe v. Ozark Christian College*, which is sure to have Missouri employers and human resource professionals breathing a collective sigh of relief – at least for now.

In *Ozark*, the defendant is a religious college. The school educates students in ministry and from time to time makes recommendations to prospective employers – *i.e.*, churches – regarding placement of those students in open positions. The college has no affiliation with the churches who hire students the school recommends. The plaintiff in *Ozark* claimed he was sexually abused by a minister at his church from 2006 to 2010. The minister had been hired by the church upon the college's positive recommendation of him in 2004. The plaintiff filed suit against the *college*, alleging that it owed a duty to not make a negligent recommendation to the church about the employee who allegedly abused him years later. Even though no such duty had ever been recognized under Missouri law, the plaintiff invited the court to recognize a new cause of action based on policy arguments and the fact that other states (specifically, California and Texas) had arguably recognized such claims.

Luckily for employers across the state, the Southern District affirmed the lower court's summary judgment and declined the plaintiff's invitation to find such a duty exists.

First, the court rejected the notion that the college somehow assumed a duty under Missouri law in making a "gratuitous provision of an employment recommendation." The court noted that the plaintiff did not even make such an allegation; instead, all he had alleged was that after graduation, the college assisted and guided the employee at various churches from 1998 to 2004. This, according to the court, did not support even an inference that the college intended to benefit *the employer church* when it gave the recommendation. As

such, there was no such duty under existing Missouri law.

Second, and perhaps more consequential for Missouri employers, the court rejected the plaintiff's policy-based arguments to create a new cause of action out of thin air. While the court noted that California and Texas arguably recognize the alleged duty the plaintiff was pushing, a majority of other states, including Kentucky, Indiana, Illinois and New York, have rejected it.

The court sided with the latter states and declined to recognize this new cause of action. However, the court appeared to couch its decision, at least in part, in its role as "error-correcting" court, as opposed to the Missouri Supreme Court, which is the "law-declaring" court. The plaintiff apparently read this language as an invitation because on May 2, 2019, he filed an application to transfer the matter to the Supreme Court for further review.

Also, it is important to note that in *Ozark*, there was no indication that the college had any knowledge or indication that the employee minister may sexually abuse someone when it made the recommendation. (The only allegation was that the employee *subsequently* abused the student.) If that had been the case, the court could easily have gone the other way. States such as Missouri's neighbor Illinois have recognized a duty in making recommendations, where there is prior knowledge of bad acts or conduct, in this very type of circumstance. *See e.g., Doe v. McLean County Unit District No. 5,* 973 N.E.2d 880 (Ill. 2012)

Obviously, how the Supreme Court rules will have a major impact on employers and human resource professionals in Missouri going forward. Potential exposure to liability for the future acts of applicants for whom someone simply responds to a request for recommendation could have a significant, chilling and stifling effect. What former employer would want to go out on a limb to make a recommendation for an applicant if they can be potentially liable based on that applicant's potential future conduct? What incentive would they have to even respond?

And this is to say nothing of the harmful effect it could have on prospective employers, who would likely be deprived of otherwise helpful information about applicants in the hiring process. If recommendation requests go unanswered, the hiring employer has less useful information about the applicant to make its hiring and personnel decisions.

In short, a recognized cause of action for negligent recommendations could be bad news for Missouri employers and employees alike.

This blog will monitor the Supreme Court's review and update when a final determination is made.